United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

ELGIE & COMPANY,

Plaintiff-Appellant,
(Docket No. 76-7510)

—against—

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant-Appellee and Third-Party Plaintiff-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLEE-APPELLANT

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Statement

Third-party Defendant-Appellee (ITO) in its brief, has acknowledged that they are not defending Defendant-Appellee-Appellant's (South African Marine) indemnity action on the grounds that it was not negligent, but

rather than its acts and/or omissions, if any, were not the *proximate cause* of the loss in question. (TPD* page 2)

ITO's counter statement of facts requires rebuttal insofar as it attempts to turn an unestablished fact into a certainty. It is not disputed, that a contract for stevedoring services existed between ITO and South African Marine. The Trial Court noted ITO's failure to load all of the cargo aboard the originally scheduled vessel, the S.A. MORGENSTER, and moreover, found that both South African Marine and ITO were negligent and responsible for the issuance of the erroneous bill of lading. The above actions by the stevedore clearly constituted a breach by ITO of its contract with South African Marine. The evidence introduced by ITO is insufficient to establish *exclusive* custody and control of the missing crate by South African Marine. Whether or not South African Marine ever had custody and control of the crate in question, vis-a-vis the stevedore was clearly not a finding of the District Court However, the Court did find the stevedore's negligent conduct and/or its breach of its implied warranty of workmanlike service was a *proximate cause* of the loss of the crate in question in that the loss *would not* have occurred in the absence of such conduct. That conduct was certainly the reason for the loss. ITO argues that as long as it loaded one crate on one ship and eleven pieces on another ship, it completed its contracted duty. This is pure nonsense. ITO negligently placed a single shipment on two different vessels and only notified South African Marine of loading on one vessel. The facts are clear, the unmanifested, unrecorded crate on board the S.A. MORGENSTER could not possibly have arrived at its original destination without proper documentation and notification by ITO in the first instance.

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* Reference to pages in ITO brief.

Comment on Defendant-Appellee's Counter Statement of Facts.

ITO's defense in this case boils down to the fact that the missing crate was in fact loaded aboard the MORGENSTER and this loading was proper. ITO does not dispute that it failed to load all of the 12 packages aboard the MORGENSTER as was originally intended. Rather it attempts to shift the blame for this omission to South African Marine by establishing "unequivocally" that the package was in fact delivered to South African Marine's *exclusive* custody and control, thereby releasing ITO from all liability.

However, the evidence does not support such a finding. Although ITO asserts that Mr. Santici testified that the tally, in his observations, *clearly* showed that the one crate had been loaded aboard the vessel, (TPD pp. 2-3), this was hardly the case. The District Court noted that the evidence was far from conclusive. (20a). Mr. Santici admitted that he was not testifying from his memory of what occurred in March 1974, but rather only what was on the "unsigned tally." (432a) Mr. Santici admitted that it was *the practice* in the Port of New York that when the tally man is satisfied that cargo has been loaded aboard a vessel, he signs the tally. The signature is proof that it has been loaded. (434a, 435a) Mr. Santici's tally was unsigned (ITO's Exhibit H 622a), the only unsigned tally for the entire shipment of 12 packages. Mr. Santici testified that he tallied the cargo *on the pier* as the cargo was moved from the bay and put on the stringpiece. (435a) He further admitted that it was more accurate to have a checker observe the cargo as it is being loaded aboard the vessel rather than it being merely moved to the string-

piece by the hi-lo. (436a) Although he asserted that it was extremely unusual for cargo to be moved out of the bay and not loaded, (437a) he did admit there was always the possibility, (436a) on which occasion the hi-lo drivers are supposed to notify someone (437a). Moreover, Judge Goettel, commenting on the hatch tallies during the trial, noted that "besides being illegible in part, they are very vague as to what they concern." (363a) He further stated that "the accuracy of what went aboard and where it went aboard has not been questioned as to the signed NEDERBURG tallies. It is the unsigned MORGENSTER tally which is placed in suspect both because it does not accurately—it doesn't tally up with what is shown in the hatch plan and because there was no split shipment dock receipt sent forward and because it describes the crate, which it must have been if it was only one, as being parts when, in fact, it was a generator." (377a, 378a)

ITO asserts that the statement in South African Marine's brief that the entire shipment of optical machinery and accessories was, according to ITO, loaded on board the S.A. NEDERBURG for Durban, is incorrect. ITO is attempting to draw into question the accuracy of South African Marine's brief by challenging the very issue which the District Court could not resolve. (23a) ITO's statement that it has always maintained that only 11 pieces of the shipment in question were ever loaded aboard the S.A. NEDERBURG could likewise be drawn into question in that South African Marine has maintained, at all times, that *ITO never notified South African Marine that* only *11 pieces were loaded aboard the* NEDERBURG. Consequently, South African Marine, relying on ITO to tally and load the cargo aboard the vessel, assumed that the entire shipment went forward on the NEDERBURG, unless otherwise notified.

If the missing crate had outturned at Durban, South Africa or any other South African port from any South African Marine vessel, there would be no need for the instant law suit.

ITO's disapproval of the statement that the District Court found that ITO *was* primarily at fault as opposed to *may be* primarily at fault (TPD 3, 4) is purely a question of semantics. ITO admitted that the cargo was not "intentionally" shut out but rather was *negligently* left behind by ITO (371a, 375a). During the course of the trial, ITO's attorney made it clear that the cargo was not intentionally shut out of the MORGENSTER, but was *negligently* (to use ITO's terminology, "accidentally") left behind. (376a)

The statement, contested by ITO at TPD 4, that if there were no documents or other notification alerting South African Marine to the missing crate's presence on the MORGENSTER would necessarily preclude that item of cargo being found on that vessel's manifest, needs no supportive evidence. The statement speaks for itself. Assuming lack of notification that the cargo was loaded aboard the vessel, how in the world would that cargo appear on the manifest?

Throughout ITO's "detailed statement of facts" (TPD 5-13) it presumes the existence of a fact that was not established at trial. It asserts that the evidence clearly shows that the one piece of the subject shipment was loaded aboard the S.A. MORGENSTER, whereas the Court merely stated that it "probably" went aboard that vessel. (6a)

ITO contested the testimony by South African Marine that envelopes of dock receipts representing shut out cargo

were sent by ITO to South African Marine to notify them of the shut out cargo. (TPD 8, 9) It asserts that it was not the practice at that time to forward such copies of their dock receipts. (TPD 9) Yet at the same time ITO's own witness contradicts this non-existent practice noting that there was no need to forward dock receipts in this instance since ITO was of the opinion that the cargo was not shut out. (381a-382a) (TPD 9) ITO's own witness John Flynn testified that he recalled sending over dock receipts at that time, although not on this particular shipment because he had *assumed it was not shut out.* (371a, 372a)

ITO further contests the second envelope theory on the basis that neither ITO nor South African Marine listed the shipment in question as being shut out before the S.S. MORGENSTER sailed in March of 1974. (TPD 9) This statement, although technically correct, does not support ITO's implication. The fact is South African Marine did list the shipment in question as being shut out after the S.S. MORGENSTER sailed. (380a-381a) John Minutello testified that South African Marine would not have included the entire shipment on the list of shut out cargo (Exhibit G, 600a) from the MORGENSTER *unless* they received a copy of the dock receipt from ITO. (244a) Moreover, the District Court commented on this list during the trial as follows:

> "Look at the other cargo both immediately before and immediately after it. Copeland doesn't appear to be a last minute addition called in when something was found on the pier." (380a)

The list would have been no use to anyone in loading the S.A. NEDERBURG if it had been prepared after the NEDERBURG started loading on March 22, 1974.

The fact that the "hold on dock" orders which were forwarded by South African Marine to ITO during the loading of the MORGENSTER did not have notations for dock receipt #207 (TPD 9) is totally irrelevant in light of the admission by ITO that it had left the shipment in question on the pier accidentally. (TPD 9, 376a)

Nicholas Casta's (South African Marine's claims manager) notations on the ocean carrier's copy of the dock receipt (Defendant's Exh. B, 590a) cannot be the subject of any inferences, as proposed by ITO. (TPD 12) The District Court made no reference whatever to those notations in its decision. (3a-32a) Moreover, those handwritten notations were not admitted into evidence by any party. (241a, 242a) The handwriting on that document was conceded to be that of South African Marine Claims Manager Casta. (258) The claims manager would necessarily not become involved in a particular shipment until there has been a claim on that shipment. Moreover, ITO testified that it notified Matty Percia, Bob Johnson or Dick O'Leary of the 11 pieces discovered, (450a) not Mr. Casta. Indeed, the statement on the dock receipt itself (Defendant's Exhibit B—590a) could just as well be interpreted as a search for the applicable loading tallies after a claim had been made. The method of notation found on the dock receipt parallels that of the hatch tallies in question (ITO's Exhibit H, 622a), documents which South African Marine never receives during the normal course of business. (232a) These are documents solely in the possession and control of ITO.

In conclusion, it has been far from established that the missing crate was loaded aboard the S.S. MORGENSTER. Whether or not it was so loaded, it was ITO's error in failing to load *all* the cargo aboard the MORGENSTER and in

failing to properly notify South African Marine of this fact that invited the disappearance of the crate.

The plain truth of the matter is that ITO "goofed" and split a shipment but did not notify South African Marine of that fact. This improper loading on two vessels and the subsequent failure to notify South African Marine led to the loss in this case.

POINT I

ITO must indemnify the ocean carrier for all damages it has suffered or may suffer as a result of the loss of the crate, since ITO was negligent and/or breached its implied warranty of workmanlike service in performing its stevedoring services for South African Marine, which conduct proximately caused the loss of the missing crate.

Whatever definition is used to delineate the term "proximate cause" it is clear from the facts elicited at trial that the acts and omissions of ITO were the cause in fact of the loss of the missing crate. If ITO had not negligently split up the Elgie shipment, and had it not failed to notify South African Marine of the split shipment, there is no evidence to indicate that the missing crate *would not* have been delivered. The fact that the missing crate was documented as going forward on one vessel, when *in fact* it was never loaded on that vessel, strongly supports the South African position of causation. ITO's arguments completely fail in this regard. Merely because South African Marine *may have been* partially at fault for the issuance of the erroneous bill of lading, this should not absolve the stevedore from liability. In fact, South African Marine's "fault"

in issuing the "on board" bill of lading was a direct consequence of ITO's negligence. The loss of the crate was a result of improper loading and documentation of that loading, which was in the exclusive control of ITO. South African Marine merely relied on information supplied by ITO to draft its documentation. Professor Prosser has noted in this regard:

> "[I]f the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present. In particular, however, a defendant is not necessarily relieved of liability because the negligence of another person is also a contributing cause, and that person, too, is to be held liable."

W. L. Prosser, The Law of Torts, 4th Edition, at 240-241 (1971).

It is without question that ITO was in complete charge of the receiving, storing, loading, and tallying of cargo aboard South African Marine vessels. (203a, 205a, 312a, 327a) ITO admitted that the 11 cartons and one crate became separated and claimed there was no notification to South African Marine of a shut-out of the Elgie cargo on the MORGENSTER. ITO *assumed* everything went aboard the MORGENSTER. (371a, 375a).

Whether or not the missing crate was ever loaded aboard the MORGENSTER, the fact remains that ITO's assertions that it never notified South African Marine of a complete shut-out of the Elgie cargo is strongly subject to doubt. ITO testified that the 11 pieces were not discovered until

approximately a week later when they started loading the S.A. NEDERBURG. (372a, 393a, 450a) If this were true, how then can it be explained that the entire Elgie shipment was listed on Exhibit G, (600a) which is a list of cargo shut-out from the MORGENSTER to be loaded on the NEDERBURG.

As the District Court commented during the trial:

> "Look at the other cargo both immediately before and immediately after it. Copeland doesn't appear to be a last minute addition called in when something was found on the pier." (380a)

ITO must be held accountable for the loss in question. If ITO maintains that one piece was loaded aboard the MORGENSTER, they committed double error in this case. They twice failed to notify South African Marine that a partial shipment was involved. Not only should ITO have notified South African Marine of a partial loading aboard the MORGENSTER, but it should also have notified South African Marine of a partial loading on the NEDERBURG. This was not done. (256a, 283a, 284a, Defendant's Exhibit H-602a).

A more plausible explanation is that the missing crate was never loaded aboard the MORGENSTER. The unsigned tally sheet (ITO Exhibit H-622a) only evidenced that the cargo had been moved out onto the pier. (428a, 434a, 435a) The fact that it was never loaded would account for the listing of the entire Elgie shipment aboard defendant's Exhibit G. (600a)

The District Court found that both the ocean carrier and the stevedore were negligent and responsible for the issuance of the erroneous bill of lading. (26a) However, the

Court was in failing to hold the stevedore's negligence as the proximate cause of the loss. The issuance of the "erroneous" bill of lading was only the manifestation of ITO's negligent conduct. Undocumented cargo invites disappearance. ITO's failure to notify South African Marine of a split shipment certainly increased the risk that the undocumented crate would get lost, and this risk was foreseeable. In order to sustain the District Court's holding would impose an impossible burden on the carrier. In order to show that the loss was due to the improper documentation, the carrier would have to locate the missing cargo.

ITO committed a breach of the stevedoring contract and of the implied warranty of workmanlike service in this case in that it *negligently* left behind cargo consigned to a particular vessel and failed to accurately notify South African Marine of its disposition. Moreover, the evidence supports a finding that the missing crate was never loaded aboard the MORGENSTER. Its disappearance has not been adequately explained by ITO, who had exclusive control over the stevedoring operation, and who conceded that the cargo had been left on the pier for a week before the loading of the S.A. NEDERBURG. (376a) *Rodriguez* v. *Olaf Pederson Rederi A/S,* 527 F. 2d 1282 (2nd Cir., 1975). The concurrent negligence, if any, of South African Marine is not a bar to the claim for indemnity. *Rodriguez* v. *Olaf Pederson Rederi A/S, supra; Master Shipping Agency Inc.* v. *M.S. Farida,* 1976 A.M.C. 91 (S.D.N.Y. 1975).

POINT II

The implied warranty of workmanlike service is not excluded by the stevedoring contract.

The District Court did not address this issue. However, the clause referred to by ITO is not an *express* disclaimer of the implied warranty of workmanlike service. Such a disclaimer must be explicit, *Pettus* v. *Grace Line, Inc.*, 305 F. 2d 151 (2nd Cir., 1962) and such disclaimers must expressly refer to the *implied warranty of workmanlike service,* since such disclaimers will be strictly construed. *David Crystal, Inc.* v. *Cunard Steamship Co.*, 339 F. 2d 295 (2nd Cir., 1964) cert. denied, 380 U.S. 976 (1965), *Cameco, Inc.* v. *S.S. American Legion,* 514 F. 2d 1291 (2nd Cir., 1974).

CONCLUSION

The District Court's opinion as it relates to ITO should be reversed and South African Marine should be awarded full indemnity including reasonable counsel fees and costs.

Respectfully submitted,

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